STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR DEAN LINDSEY,

Defendant-Appellant.

UNPUBLISHED
January 13, 2005

No. 250145
Wayne Circuit Court
LC No. 03-004959-01

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two years in prison for the felony-firearm conviction, two to five years in prison for the felon in possession of a firearm conviction and life in prison for the first-degree murder conviction, with seventy-one days credit for time served. We affirm.

I

Defendant's first claim on appeal is that he was denied his constitutional right to a fair trial when the trial court denied defense counsel's motions for a mistrial and a new trial based on prejudice from a violation of the trial court's sequestration order and an improper exclusion from the sequestration order. We disagree.

We review a trial court's decision to grant or deny a motion for a mistrial and a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Reversal is warranted when an irregularity results in prejudice to the rights of the defendant and impairs the defendant's right to receive a fair trial. *Id. at* 704. Moreover, we review a trial court's decision to exclude a witness' testimony for violation of a sequestration order for an abuse of discretion. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The trial court has authority, at the request of a party to the proceedings or *sua sponte*, to order witnesses excluded from the courtroom so that they cannot hear the testimony of other witnesses. MRE 615; *People v Jehnsen*, 183 Mich App 305, 308; 454 NW2d 250 (1990). If a witness violates the sequestration order, the trial court has discretion to exclude the witness' testimony. *People v Nixten*, 160 Mich App 203, 209; 408 NW2d 77 (1987). However, a sequestration order does not automatically place the witnesses on notice that they must not discuss their testimony. *People v Davis*, 133 Mich App 707, 714; 350 NW2d 796 (1984). This Court has held that "[w]here the trial court is not requested to caution the sequestered witnesses not to discuss the evidence, the sequestration order is not violated by such discussion, and therefore the court does not abuse its discretion in permitting the witnesses to testify." *Id*. Furthermore, a defendant who asserts on appeal that a witness violated the trial court's sequestration order must show that the violation resulted in prejudice. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996), citing *Solak*, *supra* at 669.

Defendant argues that witnesses Aparlo Woodward and Miguel Harris violated the sequestration order when they spoke to each other while sharing a holding cell during the trial. Accordingly, defendant asserts that the trial court abused its discretion by refusing to grant defense counsel's motions for a mistrial and a new trial when it was evident that defendant's case was prejudiced by the violation and the prosecutor's introduction of testimony to impeach Woodward's and Harris' trial testimony.

The trial court, on its own initiative, ordered sequestration of the witnesses on the first day of trial. Specifically, the trial court stated:

> Now, I do notice that there are probably some family members of the defendant in the courtroom. And there will be a sequestration order for anybody who will be testifying. And you will not be able to stay in the courtroom throughout the trial if you are testifying, until possibly after you testify.

The trial court's sequestration order did not include a prohibition to the witnesses from discussing the case. Rather, the trial court instructed the witnesses to remain outside of the courtroom, at least until after they testified. Both Woodward and Harris admitted to seeing and speaking to each other while they were in the same holding cell on the morning of the third day of trial. Because the witnesses were not cautioned or prohibited from discussing their testimony, we conclude that Woodward and Harris were not in violation of the sequestration order.

Moreover, the trial court retained the discretion to determine if Woodward's and Harris' testimony would result in prejudice. Their conversation in jail resulted in Woodward recanting prior testimony incriminating defendant and in both Woodward and Harris testifying that they were not present when the victim, Deangelo Brooks, was shot and killed. Therefore, their testimony was not prejudicial to defendant's case. Even assuming that prejudice resulted from their testimony, defense counsel had the opportunity to cross-examine the witnesses to mitigate any prejudice. Because Woodward and Harris did not violate the sequestration order and because their testimony did not result in prejudice, we conclude that the trial court did not abuse its discretion by permitting both witnesses to testify at trial and denying defense counsel's related motions for a mistrial and a new trial.

Over the objection of defense counsel, the trial court excluded Sergeant Duker, the officer in charge of this case, from the sequestration order. As previously noted, the trial court has discretion to exclude witnesses from the courtroom to prevent them from hearing the testimony of other witnesses. MRE 615; *Jehnsen*, *supra* at 308. One of the purposes of a sequestration order is to prevent a witness from "coloring" his testimony in relation to the testimony presented by other witnesses. *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). Because Sergeant Duker testified to prior recorded material, there was no danger that his testimony would be tainted by his presence in the courtroom. The record contains no indication that Sergeant Duker changed his testimony in response to testimony by other witnesses or asserted a version of Woodward's and Harris' prior statements that deviated from the record. Therefore, we are unconvinced that the trial court abused its discretion by excluding Sergeant Duker from the sequestration order and permitting him to testify at trial.

II

Defendant's second claim on appeal is that the prosecutor prejudiced defendant's case by calling Sergeant Duker and Shantonio Brooks, the victim's brother, to testify to prior inconsistent statements made by Woodward and Harris that were inadmissible as irrelevant and prejudicial or as hearsay used for substantive purposes. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion; however, we review de novo a preliminary question of law involved in that decision. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). We find an abuse of discretion "if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *People v Gonzalez*, 256 Mich App 212, 217; 663 NW2d 499 (2003). A ruling on a close evidentiary question is not generally considered an abuse of discretion. *Id.*

Under MRE 613(b), a prior inconsistent statement is generally admissible to challenge the credibility of a witness, not to establish the truth of the prior statement. *People v Jenkins*, 450 Mich 249, 260-262; 537 NW2d 828 (1995). Under MRE 607, the government is permitted to impeach its own witnesses. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). Evidence of a prior inconsistent statement of a witness is generally admissible to impeach a witness although the statement may tend to directly inculpate the defendant. *Id.*

In *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994), the Michigan Supreme Court created an exception to this general rule by prohibiting a prosecutor from using a statement that directly inculpates the defendant under the "guise" of impeachment absent other testimony from the witness making his credibility a relevant issue. The *Kilbourn* Court summarized the rule as disallowing impeachment evidence when (1) the substance of the statement ostensibly used to impeach the credibility of a witness is relevant to the main issue of the case, and (2) there exists no other testimony from that witness that makes his credibility relevant to the case. *Kilbourn*, *supra* at 683. However, this rule is to be construed very narrowly and close attention should be paid to the second prong of the test. *Id*. at 683-684. Even assuming that the evidence was erroneously admitted, this Court will consider the error harmless if it did not result in prejudice to the defendant. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998).

Here, the first prong of the impeachment exclusion test was met because Woodward's and Harris' prior statements were relevant to the central issue of this case, defendant's guilt. However, the second prong of the test was not met because Woodward and Harris both provided other testimony that made their credibility relevant. The prosecutor asserted a theory that Woodward and Harris were credible witnesses who were present when defendant killed Brooks but changed their testimony due to fear of reprisal. During the second day of trial, Woodward testified to a version of events inculpating defendant. On the third day of trial, Woodward recanted the previous days' testimony and insisted that he was not present at the time of the shooting. Woodward's credibility became an issue at trial as a result of the impromptu change in his testimony during trial. Likewise, Harris changed his prior version of the events surrounding Brooks' murder. Harris' credibility became an issue at trial when he denied prior statements, which he made under oath asserting his presence at the scene of the shooting. Both witnesses gave prior statements detailing the events surrounding Brooks' murder and indicating their presence and involvement in events that occurred prior to and after the shooting. Both witnesses then denied any involvement or presence at the scene. Because there was further basis to question the credibility of Woodward and Harris, the second prong of the impeachment exclusion test was not met. Accordingly, we conclude that the trial court did not abuse its discretion by permitting Sergeant Duker and Shantonio Brooks to testify to Woodward's and Harris' prior inconsistent statements to impeach their trial testimony.

Even assuming that the trial court abused its discretion by permitting this evidence, defendant failed to show prejudice. First, the trial court gave an instruction to the jury explaining the limited purpose for which the impeachment evidence was admitted. Because a jury is presumed to follow the court's instructions, the instructions are generally presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Therefore, we conclude that the trial court's limiting instruction cured any prejudicial effect from the admission of the impeachment evidence. Second, the purpose of limiting a prior inconsistent statement that was not sworn testimony is to prevent a jury from convicting a defendant based on "extrajudicial statements" by a witness instead of substantive evidence. *Jenkins*, *supra* at 261. Here, the trial court admitted Woodward's and Harris' prior *sworn* testimony from their respective investigative subpoena hearings for the truth of the matter asserted. There was evidence that Woodward's and Harris' prior statements to police, which were used for impeachment purposes, were consistent with their prior sworn testimony at later investigative subpoena hearings on the matter and were admitted as exhibits during the investigative subpoena hearings. Therefore, the danger that the jury would convict defendant based on extrajudicial information was eliminated in this case because the trial court admitted similar prior testimony for substantive purposes at trial.

III

Defendant's third claim on appeal is that defendant was denied his right to a fair trial when the prosecutor, ostensibly for impeachment purposes, elicited testimony that Harris was threatened and that Harris informed Woodward about these threats while they were incarcerated together. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion, but we review de novo a preliminary question of law involved in that decision. *McDaniel*, *supra* at 412.

Generally, all relevant evidence is admissible. *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995). Relevant evidence consists of evidence with any tendency to make the existence of an important fact more or less probable. MRE 401; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). Relevant evidence is material to the issues and has probative value. *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). To be material, a fact need not be an element of a crime or defense; however it must be "in issue" such that it is "within the range of litigated matters in controversy." *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995). If the credibility of a witness offering relevant evidence becomes a disputed issue, evidence to support or attack the witness' truthfulness also becomes relevant. *Id*. at 72. A party is permitted to impeach its own witnesses. *Kilbourn*, *supra* at 682. Otherwise relevant evidence is excludable if undue prejudice substantially outweighs the probative value of the evidence. MRE 403; *People v Martzke*, 251 Mich App 282, 294; 651 NW2d 490 (2002).

During opening statement and cross-examination, defense counsel indicated that Harris fabricated his pretrial version of the events. Defense counsel suggested that Harris was merely cooperating with the prosecution in order to receive leniency on his sentence in an unrelated case when he implicated defendant as the killer in a pretrial statement to police and in his testimony at an investigative subpoena hearing. Defense counsel's indication, that Harris fabricated his prior statement to police and testimony at the investigative subpoena hearing, placed Harris' credibility at issue. The prosecutor then elicited evidence of alleged threats against Harris to refute defense counsel's assertion that Harris was only cooperating with the prosecutor in order to benefit him on another case and changed his testimony to the truth after sentencing in the unrelated case. The impeachment testimony was relevant to Harris' credibility. Although Sergeant Duker's testimony was somewhat prejudicial to defendant, the record does not indicate that defendant's case was unduly prejudiced by the admission of impeachment evidence referencing alleged threats as a reason for the witness' modified version of the events. Moreover, the prejudicial effect of evidence is best left to the contemporaneous assessment of the trial court. *Bahoda*, *supra* at 291. Therefore, we conclude that the trial court did not abuse its discretion by admitting evidence of possible threats in order to impeach Harris' credibility.

IV

Defendant's fourth claim on appeal is that defendant was denied his right to a fair trial when the prosecutor presented prejudicial evidence of defendant's prior bad acts concerning his alleged participation in home invasions. We disagree.

Because defendant failed to timely and specifically object to the introduction of prior bad acts evidence during trial, we review this unpreserved evidentiary issue for plain error affecting defendant's substantial rights. Reversal is warranted only where the error resulted in the conviction of an innocent defendant or substantially affected the fairness, integrity, or reputation of judicial proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

Except as provided by MRE 404(b)(1), use of bad acts evidence of a defendant's character is inadmissible for the purpose of preventing the danger of a conviction based on a defendant's past misbehavior. *People v Magyar*, 250 Mich App 408, 413; 648 NW2d 215 (2002). To be admissible under MRE 404(b), bad acts evidence generally must meet the following requirements: 1) the evidence must be presented for a proper purpose, 2) the evidence must be relevant, and 3) the probative value of the evidence must not be substantially

outweighed by the potential for undue prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Irrespective of MRE 404(b), evidence of other criminal acts is admissible when so closely connected with the crime of which defendant is accused as to constitute an explanation of the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). The *res gestae* exception to MRE 404(b) has also been defined as "the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect." *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978).

Here, there was evidence that the five men were riding around together attempting to burglarize homes and stopped to discuss problems regarding the home invasions. The discussion led to an argument between defendant and Brooks and, eventually, to Brooks' murder. We conclude that there was no plain error in the admission of the evidence that defendant was allegedly involved in home invasions prior to the killing. It appears from the record that the prosecution did not offer this evidence as MRE 404(b) evidence, but instead, as part of the array of events surrounding the shooting and killing of Brooks. The evidence was admissible, apart from MRE 404(b), as part of the *res gestae* of this murder. See *Sholl, supra* at 742. The group's actions that night, including the alleged burglaries in which the members participated, were so connected with the shooting and killing of Brooks that they inherently explained the surrounding circumstances of the murder. Specifically, the events explained the relationship between defendant and Brooks and the possible motive for defendant's actions. Therefore, we hold that defendant was not denied his right to a fair trial because references were made to his alleged participation in home invasions as relevant to material matters in the case and blended with the entire incident.

Furthermore, we conclude that the prosecutor's failure to give notice of intent to introduce prior bad acts evidence does not require reversal of defendant's convictions. Because this evidence was admissible pursuant to the *res gestae* exception to MRE 404(b), notice to defendant would not have had any effect on whether the trial court should have admitted the evidence at trial, irrespective of the arguments that defense counsel could have presented to the court.

V

Defendant's fifth claim on appeal is that the trial court abused its discretion when it refused defense counsel's request for the appointment of an investigator to interview witnesses for this case. We disagree. A trial court's decision whether to appoint an investigator is reviewed for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 260; 631 NW2d 1 (2001).

At the final pre-trial conference and only three days prior to trial, defense counsel moved for the trial court to appoint an investigator to interview witnesses. The prosecutor did not object to a court-appointed investigator for defendant. However, the trial court denied defense counsel's request as untimely.

Defendant relies on *Mason v Arizona*, 504 F2d 1345 (CA 9, 1974), to support his assertion that he was entitled to a court-appointed investigator under his constitutional right to due process. However, the *Mason* Court stated, "[S]uch assistance is not automatically mandatory but rather depends upon the need as revealed by the facts and circumstances of each case." *Id*. at 1352. The trial court has discretion to determine whether an indigent defendant has demonstrated from the facts and circumstances of the case that an investigator is necessary to ensure due process. *Johnson*, *supra* at 260. A defendant's reasons cannot rest on "pure conjecture." *Id*.

Here, defense counsel's request indicated that an investigator was needed to interview witnesses, particularly witnesses who were incarcerated. However, defendant's claim fails because it is based on conjecture. Defense counsel failed to show the necessity of an investigator. There was no proof that defense counsel was unable to interview key witnesses or to investigate witnesses sufficiently to present a proper defense. Moreover, defense counsel requested the appointment of an investigator only three days prior to the scheduled trial. A trial court may consider the timing of such a request in determining whether to grant it. See *People v Lueth*, 253 Mich App 670, 689; 660 NW2d 322 (2002). Accordingly, we hold that the trial court did not abuse its discretion when it determined that defense counsel's request was "too late" and refused to appoint an investigator.

Affirmed.

/s/ Janet T. Neff
/s/ Roman S. Gribbs